STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2013OS
v	No. 309263 Macomb Circuit Court
RANDALL JAMES CABALLERO, Defendant-Appellant.	LC No. 2011-000905-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of assault with intent to murder, MCL 750.83, and first-degree child abuse, MCL 750.136b(2). He was sentenced to serve 200 to 300 months in prison for the assault with intent to murder conviction and 90 to 180 months for the first-degree child abuse conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

First, defendant contends that his conviction of assault with intent to murder must be vacated because the prosecutor failed to present sufficient evidence that he had the requisite intent to kill. We disagree.

When reviewing a claim of insufficient evidence, we review the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecutor proved the elements of the charged offense beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence, and the reasonable inferences drawn from that evidence, can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

"The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as . . . intent," the jury's resolution of such issues can be supported by even "minimal circumstantial evidence" and may be inferred from the evidence. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). It is for the trier of fact to decide what

inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The evidence showed that, on the night in question, defendant, who had been watching television in his home, got up, put on a warm jacket, pants, and shoes, took his wallet, driver's license, and cell phone, and grabbed his young stepson out of his bed. Defendant took the child out into a cold winter's night with no shoes or socks and no coat, made him walk on the snow, choked him until defendant thought that he had stopped breathing, and left him in the snow about six tenths of a mile from their home. Defendant walked around the neighborhood until he saw a house with lights on and went up to the door and asked them to call 911.

The first words that defendant spoke to the police were, "I just killed my stepson." He also told the police, "I just strangled my three-year-old son and I left his body on Dowling." He told the police he did not believe the child was still breathing when he left him. He gave the police a location where they could find the body, but the police did not initially find the child in that location; the police found the child about 30 minutes after the dispatch to the police officers. The child was whimpering, incoherent, and non-responsive, and he could not focus his eyes. He was in such critical condition that he was air-lifted to a hospital that provided intensive care to children. While he ultimately recovered from the assault, the fact that the child suffered no lasting physical injuries is not probative of the defendant's intent. These facts certainly provide more than "minimal circumstantial evidence" to support the element of intent. *Kanaan*, 278 Mich App at 622.

Defendant argues that he lacked the intent to kill because, among other reasons, defendant "did not actually inflict a life-threatening injury on [the child]." However, the fact that the child suffered no lasting physical injuries is not a consideration in determining intent. The question for the jury with regard to intent was whether, at the time of his conduct, defendant intended to kill the child. The elements of the offense are satisfied if the defendant's actions "*if* successful, would make the killing murder." *McRunels*, 237 Mich App 181 (emphasis added). Accordingly, that defendant's actions were not in fact successful in killing the child is immaterial to the jury's determination whether defendant possessed the intent to kill. These facts provide more than "minimal circumstantial evidence" to support the element of intent. *Kanaan*, 278 Mich App at 622. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the prosecutor proved the element of intent beyond a reasonable doubt. *Wolfe*, 440 Mich at 515.

II. SENTENCING

Next, defendant contends that the scoring of Offense Variable (OV) 3, MCL 777.33(1), at 25 points was incorrect, and that he was denied the effective assistance of counsel because his attorney failed to object to the scoring. We disagree.

Defendant preserved this issue for appellate review by filing a motion to remand in this Court, which was denied. MCL 769.34(10). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 3 addresses physical injury to a victim. MCL 777.33. A trial court must assess 25 points for OV 3 if "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). The emergency room physician who attended to the child testified that, when he arrived, the child was hypothermic. His body temperature was in the 75 to 80 degree range, which was very dangerous and could have resulted in the child's heart stopping. The doctor stated that the cells in the body do not function at that level and that a body would not survive for an extended period of time at those temperatures. In his report, the doctor stated that, without medical intervention on an urgent basis, there was a "likely high probability" of "sudden clinically significant or life-threatening deterioration in the patient's condition." Following initial treatment to stabilize him, the child was then airlifted to a hospital that could provide intensive care treatment for children. The doctor's testimony makes clear that but for the swift intervention that occurred in this case there was a high probability that the child would have died. We find this testimony provided sufficient evidence on the record to support the score of 25 points for OV 3. The child suffered severe hypothermia, a life-threatening injury. Finding sufficient evidence to support the score of 25 points for OV 3, we conclude that the trial court properly scored OV 3 and resentencing is not required.

Because the trial court's OV 3 score was correct, defendant's argument that he was denied the effective assistance of counsel because defense counsel failed to object to the scoring is without merit. Defense counsel was "not required to advocate a meritless position," *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), or make a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter